# STATE OF MICHIGAN

# COURT OF APPEALS

DONALD V. BOND,

Plaintiff-Appellant,

v

U.S. BANK NATIONAL ASSOCIATION,

Defendant-Appellee.

UNPUBLISHED
April 5, 2012

No. 302391
Livingston Circuit Court
LC No. 10-25122-CH

Before: M. J. KELLY, P.J., and WILDER and SHAPIRO, JJ.

PER CURIAM.

Donald Bond is challenging the procedure by which U.S. Bank National Association (U.S. Bank) foreclosed upon plaintiff's house (the property). Bond appeals by right from the trial court's order granting summary disposition in favor of defendant. We affirm because the trial court correctly held that Bond's claims are barred by the doctrine of res judicata.

## I. FACTUAL AND PROCEDURAL HISTORY

U.S. Bank commenced foreclosure by advertisement proceedings against plaintiff on September 10, 2008. U.S. Bank did not obtain an interest in the mortgage until October 13, 2008. Bond took no action to prevent U.S. Bank from proceeding with the foreclosure sale, which took place on November 5, 2008. U.S. Bank purchased the property at the foreclosure sale, and commenced a summary eviction proceeding after the expiration of the redemption period. Bond defended the eviction proceeding, arguing in part that the foreclosure was invalid because U.S. Bank did not own an interest in the mortgage at the time foreclosure proceedings began. However, the district court ruled in favor of U.S. Bank. The circuit court affirmed, holding that the issues raised by Bond were not applicable to an eviction proceeding after the expiration of the redemption period. Bond attempted to appeal by right to this Court, but the appeal was rejected as untimely with a note that Bond could file a delayed application for leave to appeal. Order of the Court of Appeals entered October 9, 2009 (Docket No. 294310). Bond did not file a delayed application for leave to appeal.

On November 20, 2009, Bond filed suit in the U.S. District Court for the Eastern District of Michigan, alleging that the foreclosure proceedings violated the federal Fair Debt Collection Practices Act and the Due Process Clause of the Fourteenth Amendment. The court rejected these claims, and also noted that they were barred by res judicata because they could have been

addressed in the previous litigation between the parties. Bond then filed the present action on March 29, 2010.

## II. ANALYSIS

Appellant asserts that the underlying facts of this case are indistinguishable from *Davenport v HSBC Bank*, 275 Mich App 344; 739 NW2d 383 (2007). In that case, the defendant bank did not own the mortgage at the time it commenced foreclosure by advertisement. *Id.* at 346. This Court held that MCL 600.3204(1)(d) permits only the owner of the mortgage to foreclose by advertisement, and that foreclosure proceedings initiated by any other party are void ab initio. *Id.* at 346-348.

However, the procedural history of the present case controls. The foreclosure proceedings have already been the subject of two lawsuits, so we must consider the doctrine of res judicata.

> The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. [*Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 418; 733 NW2d 755, 759 (2007).]

The eviction case described above involved the same parties as the present case, the case was decided on its merits, and Bond raised in that case the argument that the foreclosure was void ab initio.[1] Further, the arguments made in this case could also have been made in the federal case, which was also decided on its merits and involved the same parties. The trial court in the present case correctly concluded that Bond's lawsuit is barred by the doctrine of res judicata.

Bond argues that U.S. Bank waived the defense of res judicata because it did not plead the defense with sufficient particularity. Bond cites MCR 2.112(G), which states, "A judgment or decision . . . must be alleged with sufficient particularity to identify it . . . ." Similarly, MCR 2.111(F)(3) requires a party to "state the facts constituting . . . an affirmative defense." However, this Court has held that "[t]he primary function of a pleading is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position. No pleading is insufficient, so far as facts are concerned, which serves this function." *Hanon v Barber*, 99 Mich App 851, 856; 298 NW2d 866 (1980). The plaintiff in *Hanon*, like

[1] Unfortunately, the trial court in that case erroneously concluded that a foreclosure could not be challenged during eviction proceedings. In fact, "[t]he Supreme Court has long held that the mortgagor may hold over after foreclosure by advertisement and test the validity of the sale in the summary [eviction] proceeding." *Mfrs Hanover Mortgage Corp v Snell*, 142 Mich App 548, 553; 370 NW2d 401 (1985). If Bond had properly perfected an appeal in the original eviction lawsuit, the error might have been corrected. We also note that Bond does not dispute that he was in default on the mortgage.

Bond here, alleged that the defendant had failed to state the facts supporting the affirmative defenses. The *Hanon* Court determined that the plaintiff had sufficient notice to respond to the affirmative defenses, and refused to strike the defenses. Here, U.S. Bank stated only that "Plaintiff's claims are barred because of a prior judgment or other disposition of the claim(s) before commencement of this action," and "Plaintiff's claims are barred by the doctrine of res judicata." Although U.S. Bank did not specifically list the court cases in which Bond's claims were or could have been previously litigated, Bond was certainly aware of the previous litigation between the parties. U.S. Bank's pleading put Bond on notice that the bank intended to rely on the previous judgments to prevent Bond from getting another bite at the apple.

Affirmed.

/s/ Michael J. Kelly
/s/ Kurt T. Wilder
/s/ Douglas B. Shapiro